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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-34

JOHN ROSS,

Petitioner,

versus

MOBIL OIL CORPORATION, THE BARGE MCM NO. 2, HER ENGINES, BOILERS, TACKLE, APPAREL, FURNITURE AND GEAR AND THE MOVABLE OFFSHORE PLATFORM NO. 120, HER ENGINES, BOILERS, TACKLE, APPAREL, FURNITURE AND GEAR,

Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Defendants Mobil Oil Corporation, et. al., respectfully request that the Petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on February 21, 1973, be denied.

## QUESTIONS PRESENTED FOR REVIEW

I. DOES AN OFFSHORE EMPLOYEE WHO IS EMPLOYED AS A WELDER AND ASSIGNED TO PERFORM WELDING AND CUTTING DUTIES ON A FIXED STATIONARY PLATFORM AND WHILE PERFORMING SAID DUTIES IS INJURED ON A FIXED PLATFORM, HAVE A CAUSE OF ACTION UNDER THE GENERAL MARITIME LAW FOR UNSEAWORTHINESS?

II. IS THERE A GENUINE ISSUE OF MATERIAL FACT PRESENT IN THIS CASE WHICH SHOULD HAVE PRECLUDED THE DISTRICT COURT FROM GRANTING AND THE COURT OF APPEALS FROM AFFIRMING THE GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT?

## STATEMENT OF THE CASE

There is no real dispute over the material facts. The depositions, pleadings, and affidavits on record clearly show that Mr. Ross (sometimes hereinafter referred to as Plaintiff) was employed by Mobil Oil Corporation for a number of years as a welder and was assigned to, berthed, and fed on the stationary platform where he was injured.

On the day of the accident, Mr. Ross, pursuant to his duties, had cut the supports of several headers with an acetylene cutting torch so that they could be removed from the platform and replaced with new equip-

ment. Plaintiff was standing on the offshore fixed platform, some distance from the lift area, observing a crane barge lift the headers off of the platform. As the crane lifted the header from the deck of the platform, the header struck a high-pressure pipeline attached to the fixed platform causing it to come loose from its connection and strike Mr. Ross.

Defendants submit that where the above circumstances and facts exist the Plaintiff does not have a cause of action under the General Maritime Law for unseaworthiness. To the contrary, his exclusive remedy lies under the Longshoremen's and Harbor Workers' Compensation Act as provided for by the Outer Continental Shelf Lands Act.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I. An Offshore Employee, Who Is Employed As A Welder And Assigned To Perform Welding And Cutting Duties On A Fixed Stationary Platform And While Performing Said Duties Is Injured On A Fixed Platform, Does Not Have A Cause Of Action Under The General Maritime Law For Unseaworthiness.

At the outset it should be pointed out that the cases and statutes uniformly hold and provide that where a non-seaman employee is injured on a fixed stationary platform located on the Outer Continental Shelf, his disability is compensable exclusively under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. *Nations v. Morris*, 1971 A.M.C. 1820

(1971); Outer Continental Shelf Lands Act, 43 U.S.C. §1333(c).

Plaintiff has attempted to circumvent this exclusive remedy by alleging that his activities were in the nature of seaman's work and he was therefore a seaman for purposes of bringing suit under the General Maritime Law for unseaworthiness; (Mr. Ross's status as a seaman for purposes of bringing a claim under the Jones Act is not in question, having been abandoned.)

The origin of the unseaworthiness doctrine, permitting recovery by seamen for personal injuries, and the extension of said doctrine by the courts need not be reviewed here except to point out that this remedy was historically for members of a crew of a vessel. However, we know that this remedy has been extended to certain individuals who, although they are not members of a crew of a vessel, or seamen, are injured while performing work traditionally performed by seamen.

Originally, the extension applied only to those shore-based workers who were injured aboard a vessel while engaged in her service. *Seas Shipping Co. v. Sieracki*, 328 U.S. 5 (1946).

The Supreme Court expanded the doctrine in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), to include not only ship-based injuries, but also an injury sustained by a longshoreman who, while on the pier engaged in the unloading operations of a vessel, was injured by unseaworthy equipment.

In those cases cited by Plaintiff, where the seaworthiness concept has been extended to individuals who are not injured on a vessel, the injured party was a "longshoreman" or "stevedore," hired as a member of a group of individuals to load and unload vessels. The fact that a person is clearly a longshoreman suggests to the court that he is engaged in the loading operations and therefore doing work in the ship's service.

In the case at bar, Mr. Ross was not hired as a member of a gang of longshoremen and his activities on the day of the accident could hardly be characterized as loading a vessel. Mr. Ross had cut the header supports with an acetylene cutting torch pursuant to his job. It does not follow that since the headers were removed from the platform in the general area where Mr. Ross was working that Mr. Ross was "loading" the barge. Mr. Ross could just as easily have cut the header supports days in advance and been nowhere near the area when the headers were removed from the platform.

These undisputed facts simply do not lend themselves to the conclusion that Mr. Ross was loading the vessel or is that type of individual that the courts have extended this remedy to.

Counsel for Plaintiff alleges that the decision of the district court, affirmed by the Fifth Circuit Court of Appeals, is in direct conflict with the cases of *Reed v. The Yaka*, 83 S.Ct. 1349 (1963), and *Jackson v. Lykes Bros. Steamship Co., Inc.*, 87 S.Ct. 1419 (1967).

It is submitted that there is no conflict whatsoever in that Defendant has never suggested that an employee who is loading his employer's vessel has no cause of action against his employer for unseaworthiness of the employer's vessel, nor did the district court base their decision on these cases. In both the Reed and Jackson cases, *supra*, the status of the injured party as a Sieracki seaman was not in question. The injured parties there were clearly performing work in the ship's service and were injured by an unseaworthy condition. Where these facts are clearly demonstrated, the law provides the injured person with a cause of action under the General Maritime Law for unseaworthiness against the vessel owner.

Counsel for Plaintiff also alleges that the decision in this case is in direct conflict with the cases of *Gutierrez v. Waterman Steamship Corporation*, supra; *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971); and *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, No. 71-678, U.S. S.Ct., October Term, 1972, suggesting that those cases stand for the proposition that, regardless of whether Mr. Ross was engaged in loading a vessel, he would have a cause of action under the General Maritime Law for unseaworthiness if he was injured by an unseaworthy condition of the vessel. In effect, Counsel would have this court believe that a casual observer to a loading operation who is injured by an unseaworthy condition of the vessel would have an unseaworthy claim under the General Maritime Law.

It is submitted that this interpretation is patently incorrect. As previously pointed out, the courts have extended this remedy only to those individuals who are doing work traditionally performed by seamen. Where a case has allowed recovery under this doctrine, the facts clearly reflect that the injured person was performing work in the ship's service and therefore was a Sieracki seaman.

We know that in the Gutierrez case, the injured employee was a longshoreman who was injured on the pier while engaged in the unloading operations of a vessel. In the Law case, the injured employee was also a longshoreman who was injured on the pier. Their status as longshoremen was established and not in question. Where this fact is established, there is an inference that a person injured by an unseaworthy condition is engaged in the loading operations; the courts can then determine if the injury was caused by an appurtenance of the vessel.

Unlike the injured parties in the Law and Gutierrez cases, Mr. Ross was not hired as a longshoreman but rather a welder who was injured while performing his job as a welder. The courts below were necessarily concerned with his status and failed to discern from the undisputed facts that he was a Sieracki seaman in the ship's service or that his activities could be characterized as loading a vessel.

**II. There Is No Genuine Issue Of Material Fact Present In This Case Which Would Have Precluded The Courts From Granting Defendant's Motion For Summary Judgment.**

Counsel for Plaintiff states that there was a dispute as to material facts, particularly in regard to whether Mr. Ross was engaged in the loading operations at the time of his accident.

It is submitted that there is no real dispute as to material fact. As stated previously, Mr. Ross's activities at the time of his injury have been established by the pleadings, depositions, and affidavits. The fact that Plaintiff alleged that he was a Sieracki seaman because he was loading a vessel at the time of the accident does not necessarily mean a material question of fact has been presented. His duties on the day of the accident were performed in connection with improving the offshore facility and could be more appropriately characterized as in the service of the fixed platform. The fact that the headers were placed on a vessel was incidental to Mr. Ross's activities.

The logic that counsel for Plaintiff uses to connect Mr. Ross's activities to that of loading is not sound. He argues that had it not been for Mr. Ross's cutting the header supports the equipment could not have been loaded on the crane barge. Therefore, he contends that Mr. Ross was loading the vessel and must, therefore, be a longshoreman entitled to the remedy under the doctrine of unseaworthiness.

The fallacy of this argument is obvious. There are any number of persons, besides longshoremen, who perform duties without which the vessel could not be loaded. It is not and never has been the court's intention to extend the doctrine to each and every individual who may have some casual connection with a vessel's being loaded.

The District Court and the Fifth Circuit Court of Appeals, considering the undisputed facts, did not feel that Mr. Ross was in the service of the vessel by cutting header supports and therefore was not loading the vessel. Accordingly, summary judgment was granted.

This decision is not unlike the Law case, *supra*, where the District Court also granted summary judgment on the grounds that the warranty of seaworthiness did not extend to Plaintiff since he was not engaged in loading the vessel at the time he was injured and thus not in the service of the ship.

The Fifth Circuit Court of Appeals, relying on the Sieracki case, reversed the District Court, holding that the Plaintiff was within the scope of the warranty of seaworthiness because his activities were related and had proximity to and continuity with the total loading operation. The Supreme Court rejected this because too many activities fall in this "total operation" concept and reversed the Court of Appeals.

It is submitted that if the Supreme Court can find that the injured party in the Law case, who clearly had more connection to a loading operation than Mr.

Ross, is not within the extension of the doctrine of unseaworthiness, then it should also find that Mr. Ross is not entitled to said doctrine.

Although the lower courts never touched on the unseaworthy condition of the vessel, it should be pointed out that Mr. Ross, like the Plaintiff in the Law case, was not injured by a defective appurtenance of the ship's equipment but by a high-pressure pipeline that was part of the platform's equipment.

## CONCLUSION

Defendants submit that the record reflects that Mr. Ross was a nonseaman employed as a welder on a fixed, offshore platform and injured on said platform while performing his duties. It would indeed be difficult to find that Mr. Ross was a longshoreman loading the crane barge. Accordingly, Defendants respectfully request that this Honorable Court deny Plaintiff's Petition for a Writ of Certiorari.

## CERTIFICATE

I hereby certify that a copy of the above reply to Petition for a Writ of Certiorari has this day been mailed to Plaintiff's counsel of record, Mr. Frank J. Polozola, Seale, Smith & Phelps, 8225 Florida Boulevard, P. O. Box 15766, Broadview Station, Baton Rouge, Louisiana 70815.

New Orleans, Louisiana, this ____ day of _____, 1973.

_____

Joseph E. Mixon